Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

TERESA PICHOFF, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF BRUCE PICHOFF, DECEASED,
Petitioner,

v.

QHG OF SPRINGDALE, INC., DBA NORTHWEST HEALTH SYSTEM, AKA NORTHWEST MEDICAL CENTER OF WASHINGTON COUNTY; TRIAD HOSPITALS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 26, 2009

QUESTION PRESENTED

Did the Eighth Circuit err in affirming the district court's dismissal, even where the Eighth Circuit acknowledged the remedy-less "regulatory vacuum" created by the Employee Retirement Income Security Act of 1974's broad preemption of state law claims and the Supreme Court's narrow interpretation of "other appropriate equitable relief."

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Opinion of the United States Court of Appeals for the Eighth Circuit, *Pichoff v. QHG of Springdale, Inc., et al.*, No. 08-1848 (Feb. 26, 2009) 1a

Order of Dismissal of the United States District Court for the Western District of Arkansas, *Pichoff v. QHG of Springdale, Inc., et al.*, Civil No. 04-5145 (Mar. 10, 2008) 7a

Statutory Provision Involved:

Employee Retirement Income Security Act of 1974, § 502(a), 29 U.S.C. § 1132(a) 18a

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Petitioner, Teresa Pichoff, who is the widow and special administrator of the estate of Bruce Pichoff, M.D., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals appears at Appendix 1a-6a and is reported at 556 F.3d 728. The district court's opinion appears at Appendix 7a-17a; it is not reported but is available at 2008 WL 686930.

JURISDICTION

The opinion of the court of appeals was entered on February 26, 2009. On May 19, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including June 26, 2009 (App. 21a). This Court has jurisdiction based on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a), is reproduced at Appendix 18-20a.

STATEMENT OF THE CASE

1. Factual Background

Bruce Pichoff, M.D., was employed as the medical director for neonatology services at Northwest Medical Center beginning October 30, 1998. Neonatology is a subspecialty of pediatrics focused on the care of newborn infants, particularly those who are ill or prematurely born. Dr. Pichoff was a licensed medical doctor in four different states and was board-certified in both pediatrics and neonatology. He was hired to start a neonatology unit at the hospital in Springdale, Arkansas.

In February 2002, Dr. Pichoff was diagnosed with multiple myeloma, which is an incurable cancer of the plasma cells in the blood. Dr. Pichoff died on August 28, 2006, at the age of fifty. He is survived by his wife, Teresa, and four daughters, Regina, Suzanne, Michelle, and Jeanne Marie.

During Dr. Pichoff's term of employment with QHG of Springdale, Inc. d/b/a Northwest Health System, the hospital was acquired by Triad Hospitals, Inc. Triad was a plan sponsor and plan administrator for certain employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). Dr. Pichoff was a participant in his employer's medical, dental, vision, long-term disability, short-term disability, employee life insurance, dependent life insurance, voluntary AD&D, and flexible spending account plans.

During his initial period of employment, Dr. Pichoff was eligible for and did elect to carry the group life insurance plan administered by Triad with a death benefit of $1,050,000. Dr. Pichoff paid the appropriate premium and was insured in this amount until he was terminated by the hospital on January 31, 2005.

Additionally, Dr. Pichoff's life insurance plan provided for a "permanent and total disability feature" that would extend an employee's life insurance coverage with no further contribution or premium payment if he became permanently and totally disabled. Such a claim had to be made within twelve months after the employee ended active work. However, there was also a provision in the plan that the claim period would cease on the date the employee resumes work in any job for pay or profit.

Despite his diagnosis in February 2002, Dr. Pichoff continued to work as he was able until April 28, 2004. He took a leave of absence on May 1, 2004.

Without any notice to him, the hospital terminated his employment on January 31, 2005. In addition to failing to notify Dr. Pichoff (he heard about his termination from co-workers), the hospital also failed to notify TriShare Benefits (the plan administrator), and neither the hospital nor TriShare notified Aetna Life Insurance Company (the life insurance underwriter at the time). Dr. Pichoff never received any information from the hospital, Triad, TriShare, or Aetna about his rights or obligations under the group plan after his termination.

Sometime prior to April 1, 2005, senior management at the hospital advised Dr. Pichoff that, if he would return as a non-exempt part-time employee, he would be eligible to continue his life insurance coverage at the same levels that were in effect prior to his termination. Desiring to maintain life insurance coverage while faced with cancer, Dr. Pichoff entered into a two-year physician employment agreement on April 1, 2005. The agreement contained a provision that group life insurance coverage would be available to Dr. Pichoff under the hospital's plan.

Four months later, Dr. Pichoff's cancer had progressed, and he again took a medical leave of absence on August 1, 2005. The hospital again terminated Dr. Pichoff on February 2, 2006, based on a policy providing for termination of employees who do not return to work after six months on a medical leave of absence.

Again, Dr. Pichoff was given no prior notice of his termination. He contacted the hospital, and was

formally notified on February 21, 2006, that he had been terminated on February 2. In that letter, Dr. Pichoff was advised for the first time about an information packet he should receive in the mail regarding his options for continuing his benefits. He should have received a similar packet after his earlier termination in January 2005, but never did.

On February 26, 2006, Dr. Pichoff received in the mail a coverage notice from TriShare indicating he had life insurance coverage for $15,000 that would expire July 31, 2005. This was Dr. Pichoff's first notification that his life insurance coverage was no longer in the amount of $1,050,000. This notice was also the first time he had received any information from anyone about his options to extend his coverage following the termination of his employment, as well as the first time Dr. Pichoff learned his life insurance was through Sun Life Assurance Company of Canada, and not Aetna.

Over the next several weeks, Dr. Pichoff tried to convince Sun Life and Aetna that a mistake had been made, but to no avail. He learned that his original coverage of $1,050,000 lapsed upon his termination of January 31, 2005, because no claim was made to extend the coverage under the terms of the group plan. Dr. Pichoff asked Aetna to reinstate his coverage, but that claim was denied because Aetna was no longer the underwriter for the group plan, and because the hospital had failed to give Aetna notice of their termination of Dr. Pichoff's employment, and Aetna therefore deemed the request untimely.

Dr. Pichoff died on August 28, 2006.

2. Proceedings in the Courts Below

Teresa Pichoff, as special administrator of the estate, filed suit against the hospital that was Dr.

Pichoff's employer and his plan sponsor and plan administrator. Her suit alleged breach of fiduciary duties and sought equitable relief.

The defendants/appellees moved to dismiss, arguing primarily that Mrs. Pichoff's suit was characterized as a claim for money damages, and thus was not "appropriate equitable relief" as contemplated by 29 U.S.C. § 1132(a)(3). The district court specifically found that the allegations as set forth in the complaint did establish a claim that the plan administrator's actions caused Dr. Pichoff to be eliminated from coverage under the Aetna policy and never to become eligible for coverage under the Sun Life policy. App. 12a.

Mrs. Pichoff appealed, urging that the "unfortunate result" of this "cramped construction of equitable relief" is an erroneous view of the equitable remedies available under ERISA, and therefore should be reversed.

The Eighth Circuit echoed the judicial criticism of this remedy-less vacuum created by Supreme Court precedent interpreting ERISA, but affirmed the dismissal.

REASONS FOR GRANTING THE PETITION

TERESA PICHOFF'S CLAIM IS APPROPRIATE EQUITABLE RELIEF UNDER ERISA AND THE SUBSTANTIVE LAW GOVERNING TRUSTS

This case presents a recurring dilemma where courts have strained to guess at what an ambiguous phrase in a dense statute must mean. Appellees challenged Mrs. Pichoff's right to seek relief under 29 U.S.C. § 1132(a)(3), arguing that she must bring suit under other statutes (while admitting she could not qualify for any relief under those other statutes).

The district court rejected that argument, and the motion to dismiss was decided on the narrow issue of whether the relief sought by Mrs. Pichoff is "appropriate equitable relief" under § 1132(a)(3).

The prevailing application of § 1132(a)(3) is far from well-settled. In fact, the most recent Supreme Court case addressing this issue—*Sereboff v. Mid-Atlantic Med. Servs., Inc.*, 547 U.S. 356 (2006)—and the 1914 case of *Barnes v. Alexander*, 232 U.S. 117 (1914), which was exhaustively analyzed in *Sereboff*, seem to support the conclusion that the relief Mrs. Pichoff seeks *can* be construed as an appropriate equitable remedy.

Further, while several maxims of statutory construction have been brought to bear on this issue previously, the decisions have tended to ignore the nature of a *fiduciary* (a word that is liberally used in the ERISA statutes, and a concept that is a cornerstone of the entire ERISA framework). The effect of denying a claim like Mrs. Pichoff's based on a constrained reading of the phrase "appropriate equitable remedy" makes the broader concept of *fiduciary* in ERISA plans simply meaningless.

This Court's standard of review on issues involving the interpretation of ERISA is *de novo*. *See Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004). In reviewing a grant of a motion to dismiss for failing to state a claim, the reviewing court construes the pleaded facts in the light most favorable to the nonmoving party. *See Shea v. Esensten*, 107 F.3d 625, 627 (8th Cir. 1997).

A. The Relief Mrs. Pichoff Seeks Is "Appropriate Equitable Relief" for a Breach of Fiduciary Duty and Is Supported by *Sereboff*

Mrs. Pichoff has alleged facts to support a claim that the hospital breached its fiduciary duty, as the plan administrator for Dr. Pichoff's group benefits, by failing to give Dr. Pichoff necessary information, by misleading Dr. Pichoff about the status of his life insurance, and by navigating him into a trap to void his rights to continuing his substantial life insurance coverage (by offering him part-time employment). Those essential facts are:

a. the hospital (or its parent, Triad) was the plan administrator for Dr. Pichoff's life insurance plan;

b. Dr. Pichoff was not given notice of the plan's disability feature, which would waive his premiums and retain his eligibility if he met certain disability requirements;

c. the hospital terminated Dr. Pichoff after a period of health-related disability, without notice to Dr. Pichoff, the plan, or Aetna;

d. the hospital induced Dr. Pichoff to return to the hospital as a part-time employee without notice of the effect such employment would have on the disability feature of his life insurance plan, and he was misled by hospital officials, who falsely stated his life insurance would continue at the same level and amount as it was prior to his termination;

e. when Dr. Pichoff was again terminated, he became aware for the first time that the carrier and amount of his life insurance had changed, and by then there was a lapse in the original coverage;

f. neither Sun Life nor Aetna recognize any obligation to pay Dr. Pichoff's $1,050,000 life insurance benefits;

g. all administrative remedies were exhausted.

These essential facts were pled by appellant and recited in the district court's order, and at this stage they are deemed true and construed in favor of Mrs. Pichoff.

Thus, the allegations of breach of fiduciary duty are deemed true, and Mrs. Pichoff need not discuss the statutory elements or the case law supporting the particulars of the breach of duty. Further, the district court approved of the use of § 1132(a)(3) (as opposed to § 1132(a)(2)), so that argument is not the focus of this appeal. The remaining issue is whether the relief Mrs. Pichoff is seeking is an "appropriate equitable remedy" under § 1132(a)(3).

The section of ERISA in dispute simply states:

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of

> the plan, *or (B) to obtain other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> * * * * *

29 U.S.C. § 1132(a)(1)-(3) (emphasis added).

Examining the prayer for relief in Mrs. Pichoff's amended complaint, she asks for an award of *equitable relief* in the amount found appropriate (and costs and attorney's fees).

Appellees challenged Mrs. Pichoff's right to proceed under § 1132(a)(3), arguing that her proper remedy was under § 1132(a)(1)(B); however, the district court saw the fallacy of this reasoning, citing *Varity Corp. v. Howe*, 516 U.S. 489 (1996), for support and noting that Mrs. Pichoff could not proceed under subsection (a)(1)(B) because the very breach of fiduciary duty that is the core of this case caused Dr. Pichoff no longer to be a beneficiary. There is consensus agreement among the reviewing courts that subsection (a)(3) is in fact a catch-all provision.

Focusing on the claimed remedy, Mrs. Pichoff seeks made-whole relief. She is asking to be put back in precisely the place she would be, but for the hospital's breach of its fiduciary duties to Dr. Pichoff. This is precisely an equitable remedy. The fact that money would flow to Dr. Pichoff's estate from such a remedy does not change the nature of the remedy. This remedy is in the nature of specific performance, or imposing a constructive trust such that the Pichoff estate will be entitled to the same benefits it would have received but for the fiduciary's breach of its duty to Dr. Pichoff.

In considering whether the relief Mrs. Pichoff is seeking is an "appropriate equitable remedy" under § 1132(a)(3), at least four decisions of this Court must be considered. These four decisions reach different conclusions, applying different rationales to fact-intensive inquiries; thus, the resulting precedent is muddled.

This Court first constrained the "equitable relief" available under this section in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), by focusing on the word "equitable" and finding a distinction between *all* relief available at equity and the relief *traditionally* available in courts of equity. Justice Scalia opined that the former usage would render the modifier superfluous; thus, the latter must govern. *Id.* at 258. The *Mertens* Court ruled that ERISA does not permit suits for money damages against non-fiduciaries who knowingly participate in a fiduciary's breach of his duty. The facts in *Mertens* involved a suit against a pension plan's actuary for misstating the plan's solvency. However, the *Mertens* Court was closely divided, with a vigorous dissent from four Justices. The dissent disputed the majority's conclusion and noted that traditional equitable remedies available to a trust beneficiary *did* include compensatory damages to make the victims of a breach of duty whole. *Id.* at 266 (White, J., dissenting).

A few years later, the Court was again faced with whether beneficiaries of a plan could recover individual damages for a fiduciary breach by the plan. In *Varity*, plan beneficiaries sued the fiduciary after they were induced into changing companies. The Court found that the Massey-Ferguson company had engaged in a scheme to shed its unprofitable divisions into a spin-off and that corporate officials in-

duced plan members to switch their employment and benefits to the doomed company. The Court made clear that § 1132(a)(3) is the "catch-all" provision, when the other enforcement provisions of ERISA do not apply, and that the section does provide for individualized equitable relief for plan members.

Analyzing the third important decision of this Court on this topic becomes confusing, because in the case of *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), the tables were turned, and the constraint on equitable relief was used to limit a *plan's* right to sue its *beneficiary* for reimbursement of benefits. The Court characterized the relief sought (a plan's right of subrogation against a beneficiary's tort settlement) as restitution, but not the type of restitution typically available at equity. Again, four Justices dissented, with Justice Stevens insightfully commenting: "[I]t is fanciful to assume that in 1974 Congress intended to revive the obsolete distinctions between law and equity as a basis for defining the remedies available in federal court for violations of terms of a plan under ERISA." *Id.* at 221-22 (Stevens, J., dissenting).

Finally, in 2006, this Court decided *Sereboff*. Unlike *Mertens* and *Great-West*, the Court in *Sereboff* was unanimous. Likewise, contrary to the result in *Great-West*, the *Sereboff* Court did allow a plan to recover what was essentially a subrogation interest. Chief Justice Roberts, writing for the unanimous Court in *Sereboff*, relied at length on a 1914 case (*Barnes*) involving an attorney's lien for a portion of a contingency fee. Unlike the distinction in *Great-West* between restitution (legal) and restitution (traditionally equitable), the *Sereboff* decision seems to apply the opposite reasoning, holding that there is no trac-

ing requirement to make a breach of contract claim equitable in nature and that strict tracing rules for equitable restitution are of no consequence. 547 U.S. at 365.

The lien discussed in *Barnes*, and recounted in *Sereboff*, was against something that did not even exist at the time the interest was created (an unearned contingency fee against a recovery that had not yet occurred); however, Chief Justice Roberts explained at length how that would not defeat an equitable claim for the money that attorneys Street and Alexander were claiming from attorney Barnes in 1914.

This is precisely the type of uniquely equitable remedy that Mrs. Pichoff seeks. It is a lien (or a contractual right) to a fund (life insurance proceeds) that did not exist at the time of the breach of fiduciary duty, because Dr. Pichoff had not yet died. This is the very type of equitable remedy, by analogy, of which the unanimous Court approved in *Sereboff*. It is exactly the unique remedy only available to a court of equity.

Further, it is curious that the Court in *Great-West* would seize on the modifier "equitable" to the exclusion of the other modifier in the statute, "appropriate." "Appropriate" seems to denote that the remedy should fit the harm, which certainly favors Mrs. Pichoff's equitable argument that she should be made whole and recover the proceeds of Dr. Pichoff's life insurance benefits as she would if the plan administrator had not breached its fiduciary duty. In fact, this remedy is precisely the only remedy that would be "appropriate" for such a situation.

Notably, the district court found that "the funds being sought are not such as can be clearly traced to

funds in defendants' possession." App. 16a. However, the *Sereboff* decision specifically de-emphasized the strict tracing requirements and, citing to *Barnes* with approval, discussed an equitable lien over a fund that did not even exist at the time the interest was created. This bears a strong parallel to Mrs. Pichoff's situation.

On balance, *Sereboff* seems to abandon the holdings in *Mertens* and *Great-West* and to support a much more expansive reading of the equitable relief available under § 1132(a)(3).

B. The Lower Court's Ruling Renders the Concept of Fiduciary Meaningless

A fiduciary duty is the highest standard of duty implied by law. A fiduciary has the duty to act for someone else's benefit, while subordinating his or her personal interests to that of the other person. *See Black's Law Dictionary* 625 (6th ed. 1990).

A fiduciary has the duty to discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries. *See* 29 U.S.C. § 1104(a)(1). This duty encompasses three components: (1) the duty of loyalty (all decisions must be made with an eye single to the interests of the participants and beneficiaries); (2) a "prudent person" fiduciary obligation (requiring the care, skill, prudence, and diligence under the circumstances); (3) the duty that a fiduciary act for the exclusive purpose of providing benefits to plan beneficiaries. *See Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 547 (6th Cir. 1999).

Here, the hospital had a fiduciary duty, as the plan administrator for Dr. Pichoff's life insurance plan. The hospital breached that duty by failing properly to advise him, failing to give him adequate notice of

his rights to continued coverage, and inducing him into a situation that ultimately terminated his right to his significant life insurance benefits. These facts are deemed true at this stage.

This Court has shown great concern for statutory construction and thereby created the "cramped construction" of "equitable relief" to mean only the types of relief a court of equity would typically grant prior to the merger of law and equity. However, that faithfulness to the text of the statute seems miniscule as compared to the statutory dilemma created by this case.

The foundation of ERISA is the fiduciary status of plan administrators. The impetus for ERISA was to safeguard the pensions and benefits of working Americans against possible fraud and malfeasance. Thus, Congress placed special burdens and duties on companies that manage employee benefit plans. In exchange, those plan administrators enjoy a uniform federal law and regulatory scheme.

However, when a fiduciary's own negligence works to disqualify a beneficiary from benefits, and that beneficiary is denied any remedy because his damages cannot be adequately couched in terms of pre-merger equitable principles, then that construction of the statute renders the entire scheme of ERISA meaningless because it in effect guts the very essence of the fiduciary duty. In this case, the cramped application of § 1132(a)(3) absolves the fiduciary from *any* duty to its beneficiary, rather than holding it to the *highest* legal duty.

CONCLUSION

A strained reading of the word "equitable" has created a line of cases that are simply un-equitable. Read in its proper context, *appropriate equitable re-*

lief is precisely the remedy that courts of equity, also described as courts of conscience, enjoyed. Here, the plan administrator, which had the highest legal duty to Dr. Pichoff, failed to give him notice about his benefits upon termination, failed truthfully to advise him about the effect of part-time employment on his benefits, and in fact misled him and induced him into a situation that would void his substantial life insurance at a time when he was suffering from incurable cancer.

Further, while giving meaning to each word in a statute is an admirable theory, that theory must fail when the deduced meaning of a single word makes the entire statutory scheme "superfluous." The effect of the district court's application of *Mertens* (and *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593 (8th Cir. 2005)) makes the very concept of a fiduciary's high legal duty to a plan member meaningless and guts the very protection that led to the enactment of ERISA. *See Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004) (observing that the central feature of ERISA is its "object of protecting employees' justified expectations of receiving the benefits their employers promise them").

ERISA is an important statute that defines the rights of millions of individuals. The evolving loophole created by an erroneous reading of the relief available to a defrauded policy holder under ERISA has created a refuge for corporate malfeasance that has tragic results for policy holders who find their promised coverage worthless, but have no remedy.

Leaving such policy holders remediless violates the historic presumption favoring the provision of remedies for violation of federal rights. *See Great-West*, 534 U.S. at 223 (Stevens, J., dissenting); *see also*

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury.").

The petition for a writ of certiorari should be granted so as to clarify this important and shifting area of law and to avoid a corporate fraud of the most tragic magnitude.

Respectfully submitted,

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June 26, 2009

APPENDIX

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Opinion of the United States Court of Appeals for the Eighth Circuit, *Pichoff v. QHG of Springdale, Inc., et al.*, No. 08-1848 (Feb. 26, 2009) 1a

Order of Dismissal of the United States District Court for the Western District of Arkansas, *Pichoff v. QHG of Springdale, Inc., et al.*, Civil No. 04-5145 (Mar. 10, 2008) 7a

Statutory Provision Involved:

Employee Retirement Income Security Act of 1974, § 502(a), 29 U.S.C. § 1132(a) 18a

Letter from Supreme Court Clerk regarding grant of extension of time for filing a petition for a writ of certiorari (May 19, 2009) 21a

United States Court of Appeals,
Eighth Circuit.
Teresa PICHOFF, as Special Administrator of the Estate of Bruce Pichoff, Deceased Appellant,
v.
QHG OF SPRINGDALE, INC. d/b/a Northwest Health System a/k/a Northwest Medical Center of Washington County, and Triad Hospitals, Inc., Appellees.
No. 08-1848.

Submitted: Dec. 10, 2008.
Filed: Feb. 26, 2009.

Before MELLOY, and BENTON, Circuit Judges, and DOTY,[1] District Judge.

DOTY, District Judge.

Appellant Teresa Pichoff, special administrator of the estate of Dr. Bruce Pichoff, sued Dr. Pichoff's former employer, QHG of Springdale, Inc. d/b/a Northwest Health System a/k/a Northwest Medical Center of Washington County (Northwest), and Northwest's parent company, Triad Hospitals, Inc. (Triad), for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. The district court[2] dismissed the action, and we affirm.

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[1] The Honorable David S. Doty, United States District Court for the District of Minnesota, sitting by designation.

[2] The Honorable Jimm L. Hendren, United States District Judge for the Western District of Arkansas.

I.

Northwest hired Dr. Pichoff on October 30, 1998, as medical director for neonatology services. Dr. Pichoff's employment contract provided for participation in an ERISA-governed group health and welfare plan (Plan) that was underwritten by Aetna Life Insurance Company (Aetna) and administered by Triad through its TriShare Benefits program, which was outsourced to a third-party. On January 1, 2002, Dr. Pichoff elected an option for $1,050,000 in life insurance coverage.

Plan benefits generally ceased upon an employee's termination. Nevertheless, the Plan provided for an extension of life insurance benefits with no further premium payments to employees who suffered permanent and total disability. To receive the extension, the Plan required proof of disability to the underwriter no later than twelve months after the disability's onset date. The extension terminated if the employee began any work for pay or profit.

On February 5, 2002, Dr. Pichoff was diagnosed with multiple myeloma, which required him to take a medical leave of absence beginning on May 1, 2004. Unable to return to work, Northwest terminated Dr. Pichoff on January 31, 2005, without notifying him, Aetna or the third-party Plan administrator.[3] Dr. Pichoff received no additional information regarding his rights or obligations under the Plan and did not claim an extension of his life insurance benefits.

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[3] Dr. Pichoff learned of his termination from other Northwest employees in mid-February.

Thereafter, Northwest senior management advised Dr. Pichoff that he could retain his $1,050,000 in life insurance coverage if he returned to work as a non-exempt part-time employee. As a result, Dr. Pichoff and Northwest entered into a two-year employment contract on April 1, 2005, that provided for group life insurance coverage. Dr. Pichoff's health, however, continued to deteriorate and he took another medical leave of absence beginning August 1, 2005. Northwest terminated his employment on February 2, 2006.

Dr. Pichoff received written notice of his termination from Northwest on February 21, 2006, and was informed that he would receive information detailing his options for continuing his benefits coverage. On February 26, 2006, Triad provided the information and notified Dr. Pichoff that he maintained only $15,000 in life insurance coverage underwritten by Sun Life Assurance Company of Canada (Sun Life).[4] Upon investigation, Dr. Pichoff learned that his $1,050,000 life insurance policy lapsed following his January 31, 2005, termination because no claim was made to Aetna to extend the Plan's coverage. Aetna and Sun Life denied Dr. Pichoff's subsequent requests to reinstate his benefits. Dr. Pichoff died on August 28, 2006.

Appellant brought this ERISA action against Northwest and Triad for breach of fiduciary duty, seeking to recover the amount of Dr. Pichoff's life insurance coverage before his first leave of absence. The district court granted appellees' motion to dismiss for failure to state a claim because appellant's

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[4] Sun Life had replaced Aetna as the Plan underwriter.

requested monetary relief is unavailable under ERISA.

II.

We review de novo a district court's dismissal of an action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 981 (8th Cir.2008). We accept all factual allegations in the complaint as true and make all reasonable inferences in favor of the nonmoving party. *See Hastings v. Wilson*, 516 F.3d 1055, 1058 (8th Cir.2008).

A plan participant or beneficiary may bring a civil action "to obtain other appropriate equitable relief (i) to redress . . . violations [of this subchapter or the terms of the plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3)(B). This section permits plan participants and beneficiaries to "seek equitable remedies in [their] individual capacit[ies] for a breach of fiduciary duty not specifically covered by the other enforcement provisions of section 1132." *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 943 (8th Cir.1999) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 512, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996)); *see also* 29 U.S.C. § 1104 (fiduciary duties). The only issue on appeal is whether the relief sought by appellant is "other appropriate equitable relief." Appellant argues that the requested relief is allowed because she seeks reinstatement of the benefits that Dr. Pichoff's estate would have received absent appellees' alleged breach of fiduciary duty.

The term "other appropriate equitable relief" is limited to relief that was "typically available in eq-

uity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256-57, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (emphasis omitted); *see also Knieriem v. Group Health Plan, Inc.*, 434 F.3d 1058, 1061 (8th Cir.2006); *Kerr*, 184 F.3d at 943. In addition, not all monetary relief "falling under the rubric of restitution" is available under § 1132(a)(3)(B). *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002). Rather, whether restitution is equitable or compensatory depends on the "origin of the award sought." *Knieriem*, 434 F.3d at 1061. Equitable restitution seeks to impose "a constructive trust or equitable lien on 'particular funds or property in the defendant's possession.'" *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 362, 126 S.Ct. 1869, 164 L.Ed.2d 612 (2006) (quoting *Knudson*, 534 U.S. at 213, 122 S.Ct. 708). Thus, monetary relief in the form of restitution is generally available only if the action seeks "not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Knudson*, 534 U.S. at 214, 122 S.Ct. 708. To determine whether a plaintiff requests legal or equitable relief, "we ask whether the value of the harm done that forms the basis for the damages is measured by the loss to the plaintiff or the gain to the defendant, and whether the money sought is specifically identifiable as belonging in good conscience to the plaintiff." *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 596-97 (8th Cir.2005) (citations and quotations omitted).

In this case, appellees did not benefit from the lapse of Dr. Pichoff's initial life insurance policy, and they retain no funds identifiable as belonging to ap-

pellant. Rather, appellant seeks compensation for the benefits that would have been paid to Dr. Pichoff's estate had the policy not lapsed. Such relief, however, is compensatory in nature and unavailable under § 1132(a)(3)(B). *Accord Amschwand v. Spherion Corp.*, 505 F.3d 342, 343, 348 (5th Cir.2007) (section 1132(a)(3)(B) does not permit "damages in the form of payment of life insurance benefits that would have accrued to a plan beneficiary but for a plan fiduciary's breach of fiduciary duty"); *Callery v. U.S. Life Ins. Co.*, 392 F.3d 401, 406 (10th Cir.2004) (same).

III.

We share appellant's concern that her claim exists in a remedy-less "regulatory vacuum" created by ERISA's broad preemption of state law claims and the Supreme Court's narrow interpretation of "other appropriate equitable relief." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004) (Ginsburg, J., concurring); *see also Eichorn v. AT & T Corp.*, 489 F.3d 590, 591-94 (3d Cir.2007) (Ambro, J., concurring in denial of petition for rehearing en banc); E. Daniel Robinson, Note, *Embracing Equity: A New Remedy for Wrongful Health Insurance Denials*, 90 Minn. L.Rev. 1447, 1449-55 (2006). Nevertheless, we are bound by the precedent of this circuit and the Supreme Court. Accordingly, the district court's order of dismissal is affirmed.

United States District Court,
Western District of Arkansas,
Fayetteville Division.

Teresa PICHOFF, as Special Administrator of the Estate of Bruce Pichoff, Deceased, Plaintiff
v.
QHG OF SPRINGDALE, INC. d/b/a Northwest Health System a/k/a Northwest Medical Center of Washington County, and Triad Hospitals Inc., Defendants.

Civil No. 07-5145.

March 10, 2008.

ORDER

Now on this 10th day of March, 2008, comes on for consideration **Defendants' Second Motion To Dismiss And To Strike Jury Demand** (document # 20), and from said motion, and the response thereto, the Court finds and orders as follows:

1. This is a case arising under the Employee Retirement Income Security Act ("ERISA"). Plaintiff Teresa Pichoff alleges that she is the personal representative of an ERISA plan participant, Bruce Pichoff, Deceased, and asserts a claim for breach of the fiduciary duties set forth at 29 U.S.C. § 1104. Plaintiff prays for declaratory and equitable relief, attorney's fees, and costs.

Defendants move for dismissal pursuant to F.R.C.P. 12(b)(6), contending that Plaintiff fails to state a claim for breach of fiduciary duty cognizable

under the civil enforcement provisions of either 29 U.S.C. § 1132(a)(2) or § 1132(a)(3).

2. It is axiomatic that a complaint should not be dismissed under F.R.C.P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Krentz v. Robertson Fire Protection District*, 228 F.3d 897, 905 (8th Cir.2000). Because the complaint must be viewed in the light most favorable to the plaintiff, "as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Id.*

3. The Court need not devote much time to defendants' contention that plaintiff has failed to state a claim under § 1132(a)(2). That section authorizes a participant to bring suit for "appropriate relief" under 29 U.S.C. § 1109.

Plaintiff does not seek relief under § 1109, nor would it be available, given that § 1109 provides remedies to a "plan" rather than to a "participant" or a "beneficiary."

4. Section 1132(a)(3) authorizes a participant to enjoin acts which violate the terms of an ERISA plan, or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan." Section 1104 provides that a plan fiduciary "shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries . . . ." It is under these sections that Plaintiff seeks relief.

5. Defendants first argue that plaintiff is not entitled to rely upon § 1132(a)(3), because, "[d]istilled to its essence, plaintiff's complaint seeks the kind of relief available" under § 1132(a)(1)(B). That subsection allows a participant to sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

Defendants rely on *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), and quote that case to the effect that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate'." 516 U.S. at 515.

Defendants fail, however, to quote the lines which follow their selected quotation from *Varity:*

> But that is not the case here. The plaintiffs in this case could not proceed under the *first* subsection [§ 1132(a)(1)(B)] because they were no longer members of the Massey-Ferguson plan and, therefore, had no "benefits due [them] under the terms of [the] plan." They could not proceed under the *second* subsection [§ 1132(a)(2)] because that provision, tied to § 409 [§ 1109], does not provide a remedy for individual beneficiaries. They must rely on the *third* subsection [§ 1132(a)(3)] or they have no remedy at all. We are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law.

516 U.S. at 515 (internal citations omitted, emphasis in original, legal citations in brackets added).

When one considers the entire passage, it is clear that the thrust of *Varity* was to recognize that § 1132(a)(3) is – as described elsewhere in that opinion – a "catchall" provision that acts as a "safety net, offering appropriate equitable relief for injuries caused by violations that § 502 [§ 1132] does not elsewhere adequately remedy." 516 U.S. at 512 (legal citation in brackets added).

6. The Court has examined Plaintiff's Second Amended Complaint, and finds that it contains the following allegations:

* that Plaintiff's decedent, Bruce Pichoff ("Pichoff"), was at one time a participant in a life insurance plan (the "Plan") for which defendant Triad Hospitals, Inc. ("Triad") was the Plan Administrator";

* that the Plan was underwritten, from January 1, 2002, until on or around December 31, 2004, by Aetna Life Insurance Company ("Aetna");

* that from January 1, 2002, until January 31, 2005, Pichoff elected (and paid premiums for) life insurance coverage under the Plan in the amount of $1,050,000;

* that the Plan had a provision (the "Disability Feature"), pursuant to which a permanently and totally disabled employee would continue to be covered by existing life insurance without further payment of premiums. The Disability Feature would, however, cease upon the participant's return to employment;

* that Pichoff was not given notice of the Disability Feature;

* that on January 31, 2005, Pichoff was terminated from his employment by defendant QHG of Springdale, Inc. d/b/a Northwest Health System a/k/a Northwest Medical Center of Washington County, Arkansas ("NWMC"), a subsidiary of Triad, after a lengthy period of disability-related leave;

* that the termination was made without notice to Pichoff, or to the Plan, or to Aetna;

* that in April, 2005, Pichoff was persuaded to return to his employment at NWMC without notice of the effect such return might have on the Disability Feature of the Plan, and that he was given incorrect information about the Plan by NWMC, specifically that his life insurance would continue "at the same levels and amounts that were in effect prior to his termination";

* that in August, 2005, Pichoff was again required to take a disability-related leave;

* that on February 2, 2006, Pichoff was again terminated by NWMC;

* that upon receiving an information packet related to the second termination in late February, 2006, Pichoff learned that his life insurance coverage had dropped from $1,050,000 to $15,000 as a result of a lapse in coverage following his initial termination, when no claim had been made under the Disability Feature, and that Aetna had been replaced by Sun

Life Assurance Company of Canada ("Sun Life") as Plan underwriter;

* that neither Aetna nor Sun Life recognizes any obligation to pay Plaintiff $1,050,000 in life insurance proceeds on Pichoff's life.

In the Court's view, these allegations set forth a claim that defalcations of the Plan administrator caused Pichoff to be eliminated from coverage under the life insurance policy underwritten by Aetna, and to never become eligible for coverage under the life insurance policy underwritten by Sun Life.

If that view is correct, then Plaintiff cannot show that Pichoff is eligible for benefits *under* the Plan, and would have no remedy under § 1132 (a)(1)(B).

As noted in ¶ 3, *supra,* she has no remedy under § 1132(a)(2), because that subsection is tied to § 1109, which does not provide a remedy for individual participants – and if she has no remedy under § 1132(a)(3), she has no remedy at all. The Court, therefore, concludes that defendants' reliance on *Varity* is misplaced.

7. Defendants next argue that the relief sought by Plaintiff is not "appropriate equitable relief" under § 1132(a)(3) because it is not "equitable relief" at all. Instead, they say, the relief she seeks is money damages – which is the classic form of legal relief – unlike the relief sought and obtained by the *Varity* plaintiffs – which was reinstatement to a plan after having been misled into leaving it.

The pleadings in this case do not indicate a possibility of reinstatement, since the gravamen of the alleged injury is that Pichoff was misled into giving up insurance coverage that cannot now be reinstated because Aetna no longer underwrites the Plan. Thus, if money damages are not available, it appears that Plaintiff will have no remedy at all.

Although the Court in *Varity* commented that "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy," 516 U.S. at 513, it appears to have done exactly that, by restricting the scope of equitable remedies allowed under ERISA.

In *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), the Court took up the issue of whether a nonfiduciary who knowingly participates in the breach of an ERISA fiduciary duty could be held liable for plan losses resulting from the breach. The Court recognized that "at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust," and that "money damages were available in those courts against the trustee . . . and against third persons who knowingly participated in the trustee's breach." It declined to continue that tradition, however, reasoning that

> [a]t common law . . . there were many situations – not limited to those involving enforcement of a trust – in which an equity court could "establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." The term "equitable relief" can assuredly

> mean . . . whatever relief a court of equity is empowered to provide in the particular case at issue. But . . . "equitable relief" can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages). As memories of the divided bench, and familiarity with its technical refinements, recede further into the past, the former meaning becomes, perhaps, increasingly unlikely; but it remains a question of interpretation in each case which meaning is intended.
>
> In the context of the present statute, we think there can be no doubt. Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief *not at all*. We will not read the statute to render the modifier superfluous.

508 U.S. at 256-257 (internal citations omitted, italics in original). By this line of reasoning, the Supreme Court arrived at the dubious conclusion that under ERISA, "equitable relief" means only a limited class of equitable relief.

Four Justices dissented in *Mertens*, but the Court in subsequent cases continued this line of reasoning. The dissents have also continued. See, e.g., the dissent of Justice Ginsburg in *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004):

> Because the Court has coupled an encompassing interpretation of ERISA's preemptive force with a cramped construction of "equitable relief" allowable under § 502(a)(3), a "regulatory vacuum" exists: "[V]irtually all state law remedies are preempted but very few federal substitutes are provided."

542 U.S. at 222. In fact, no federal substitute has been provided for the "make whole" relief available in the common law equity tradition.

The Eighth Circuit has, as it must, followed the Supreme Court's restrictive interpretation of equitable relief in ERISA cases. Its decision in *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593 (8th Cir.2005) is instructive.

Calhoon lost his COBRA continuation insurance coverage because the ERISA fiduciary failed to send premium coupons to his new address – resulting in his failure to make the requisite payments to keep the coverage in force. Calhoon sued his former employer, its fiduciary, and the insurance company for restitution of the unpaid medical bills he incurred. He was not allowed this remedy, the court explaining:

> Beneficiaries of ERISA plans may sue for breaches of fiduciary duties under 29 U.S.C. § 1132(a)(3), but the remedies they may seek in such an action are limited by the language of the statute to traditionally available equitable remedies. The remedy of restitution may be either legal or equitable, depending on the basis for [the plaintiff's] claim and the nature of the underlying remedies sought.

> Monetary relief in the form of restitution may be considered equitable only if it seek[s] not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession. Constructive trusts and equitable liens are the most common forms of restitution in equity. Monetary damages that are compensatory in nature are traditionally considered to be legal relief because they focus on the plaintiff's losses and seek to recover in money the value of the harm done to the plaintiff instead of punishing the wrongdoer by taking his ill-gotten gains.
>
> In determining whether the nature of the monetary relief sought is equitable or legal, we ask whether the value of the harm done that forms the basis for the damages is measured by the loss to the plaintiff or the gain to the defendant, and whether the money sought is specifically identifiable as belonging in good conscience to the plaintiff and can clearly be traced to particular funds or property in the defendant's possession.

400 F.3d at 596-97 (internal citations omitted).

In light of the foregoing precedent, this Court is obliged to find that the motion to dismiss must be granted. This follows because the remedy here sought – recoupment of the amount of life insurance coverage that was in effect before Pichoff's first medical leave – is measured by the loss to Plaintiff, rather than the gain to defendants, and the funds being sought are not such as can be clearly traced to funds in defendants' possession.

This unfortunate result leaves the Plaintiff without a remedy in a situation where, if traditional equitable principles applied, she would be able to pursue a claim for equitable compensation. Nevertheless, the Court is constrained to apply the "cramped construction of equitable relief" applied by the Supreme Court and the Eighth Circuit to the facts of this case.

IT IS THEREFORE ORDERED that **Defendants' Second Motion To Dismiss And To Strike Jury Demand** (document # 20) is **granted,** and this matter is **dismissed.**

IT IS SO ORDERED.

/s/ Jimm Larry Hendren
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

STATUTORY PROVISION INVOLVED

Section 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a), provides:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) of this section or under subsection (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insur-

ance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor –

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section, by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

May 19, 2009

Mr. Timothy J. Cullen
Cullen & Co., PLLC
217 West 2nd Street
Suite 115
Little Rock, AR 72203

Re: Teresa Pichoff, as Special Administrator of the Estate of Bruce Pichoff, Deceased
v. QHG of Springdale, Inc., dba Northwest Health System, aka Northwest Medical Center of Washington County, et al.
Application No. 08A1017

Dear Mr. Cullen:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case has been presented to Justice Alito, who on May 19, 2009 extended the time to and including June 26, 2009.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
By /s/ RUTH JONES
Ruth Jones
Case Analyst

[attached notification list omitted]